

Issues: Qualification – Performance (notice of improvement needed), and Performance (arbitrary/capricious evaluation); Ruling Date: March 21, 2019; Ruling No. 2019-4872; Agency: Department of Behavioral Health and Developmental Services; Outcome: Not Qualified.



**COMMONWEALTH of VIRGINIA**  
**Department of Human Resource Management**  
**Office of Equal Employment and Dispute Resolution**

**QUALIFICATION RULING**

In the matter of the Department of Behavioral Health and Developmental Services  
Ruling Number 2019-4872  
March 21, 2019

The grievant has requested a ruling from the Office of Equal Employment and Dispute Resolution (“EEDR”) at the Department of Human Resource Management (“DHRM”) on whether his October 25, 2018 grievance with the Department of Behavioral Health and Developmental Services (the “agency”) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

On or about September 25, 2018, the grievant was issued a Notice of Improvement Needed/Substandard Performance (“NOIN”). Subsequently, in October 2018, the grievant received his annual performance evaluation. While the grievant’s overall performance was rated at the “Contributor” level, the grievant was rated a “Below Contributor” on one core responsibility as a result of the actions giving rise to the NOIN. The grievant initiated a grievance on October 25, 2018 to challenge the NOIN and his annual performance evaluation. After proceeding through the management resolution steps, the grievance was not qualified for a hearing by the agency head. The grievant now appeals that determination to EEDR.

DISCUSSION

Although state employees with access to the grievance procedure may generally grieve anything related to their employment, only certain grievances qualify for a hearing.<sup>1</sup> Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.<sup>2</sup> Thus, claims relating to issues such as the methods, means and personnel by which work activities are to be carried out generally do not qualify for a hearing, unless the grievant presents evidence raising a sufficient question as to whether discrimination, retaliation, or discipline may have improperly influenced management’s decision, or whether state policy may have been misapplied or unfairly applied.<sup>3</sup>

Further, the grievance procedure generally limits grievances that qualify to those that involve “adverse employment actions.”<sup>4</sup> Thus, typically, the threshold question is whether the grievant has suffered an adverse employment action. An adverse employment action is defined as a “tangible employment action constitut[ing] a significant change in employment status, such

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<sup>1</sup> See *Grievance Procedure Manual* § 4.1.

<sup>2</sup> Va. Code § 2.2-3004(B).

<sup>3</sup> *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).

<sup>4</sup> See *Grievance Procedure Manual* § 4.1(b).

as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.”<sup>5</sup> Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one’s employment.<sup>6</sup>

One of the management actions challenged here, a NOIN, is a form of written counseling. It is not equivalent to a Written Notice of formal discipline. A written counseling does not generally constitute an adverse employment action because such an action, in and of itself, does not have a significant detrimental effect on the terms, conditions, or benefits of employment.<sup>7</sup> Therefore, the grievant’s claims relating to his receipt of the NOIN do not qualify for a hearing.

The other management action challenged is the grievant’s receipt of an overall rating of “Contributor” on his performance evaluation.<sup>8</sup> A satisfactory performance evaluation is not an adverse employment action.<sup>9</sup> Thus, where the grievant presents no evidence of an adverse action relating to the evaluation, such a grievance does not qualify for a hearing. In this case, although the grievant disagrees with some of the information contained in his performance evaluation, he received ratings of “Contributor” on most of the individual factor ratings and his overall performance rating was “Contributor.” Most importantly, the grievant has presented no evidence that the performance evaluation itself has detrimentally altered the terms or conditions of his employment. As a result, the grievance does not qualify for a hearing on this basis.<sup>10</sup>

EEDR’s qualification rulings are final and nonappealable.<sup>11</sup>



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<sup>5</sup> Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).

<sup>6</sup> Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).

<sup>7</sup> See Boone v. Goldin, 178 F.3d 253, 256 (4th Cir. 1999).

<sup>8</sup> See DHRM Policy 1.40, *Performance Planning and Evaluation*, for additional discussion of performance evaluation procedures for state employees.

<sup>9</sup> E.g., EDR Ruling No. 2013-3580; EDR Ruling No. 2010-2358; EDR Ruling No. 2008-1986; see also James v. Booz-Allen & Hamilton, Inc., 368 F.3d 371, 377-378 (4th Cir. 2004) (holding that although his performance rating was lower than his previous yearly evaluation, there was no adverse employment action where the plaintiff failed to show that the evaluation was used as a basis to detrimentally alter the terms or conditions of his employment).

<sup>10</sup> Although this grievance does not qualify for an administrative hearing under the grievance process, the grievant may have additional rights under the Virginia Government Data Collection and Dissemination Practices Act (the “Act”). Under the Act, if the grievant gives notice that he wishes to challenge, correct or explain information contained in his personnel file, the agency shall conduct an investigation regarding the information challenged, and if the information in dispute is not corrected or purged or the dispute is otherwise not resolved, allow the grievant to file a statement of not more than 200 words setting forth his position regarding the information. Va. Code § 2.2-3806(A)(5). This “statement of dispute” shall accompany the disputed information in any subsequent dissemination or use of the information in question. *Id.*

<sup>11</sup> See Va. Code § 2.2-1202.1(5).